In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, PETITIONER

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM SUBMITTING OPINION OF THE FEDERAL MARITIME COMMISSION ON PETITIONS FOR REHEARING AND CLARIFICATION IN DOCKET NO. 872

On November 1, 1965, the Federal Maritime Commission issued the accompanying opinion denying petitions for rehearing and clarification in its Docket No. 872. Since the parties have referred to the Commission's main opinion in that proceeding and the petitioner has reprinted pertinent portions thereof in the Appendix to its brief (pp. 52–66), we think it appropriate to bring this supplemental opinion to the Court's attention.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1965.

792-693—65

SERVED
NOVEMBER 1, 1965
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

ON PETITIONS FOR REOPENING AND CLARIFICATION

Carnation Company and Far East Conference, both parties in this proceeding, have filed Petitions for Clarification of our Report and Order served in this Docket on July 28, 1965. Pacific Westbound Conference and Far East Conference have filed replies to Carnation's Petition; no replies have been filed to Far East's Petition.

(a) *Carnation's Petition:* Carnation requests the Commission to modify the Report of July 28, 1965, by a clear finding that PWC did in fact by the operation of the agreements found to be carried out in violation of Section 15 give up its right of independent action." Carnation's request discloses a failure to note the main thrust of our opinion on this point. Briefly, we found that the right of independent action was preserved by Agreement 8200 in

express terms and that the language of the agreement was never formally modified. In rejecting Carnation's position that a secret agreement existed by which PWC had given up the right of independent action we stated that "we are unable to find any evidence of a secret agreement * * *." *Report*, p. 11.

Carnation has now apparently shifted its position somewhat, so that rather than arguing that a secret agreement was made or does exist, it argues that from the respondents' course of conduct the Commission can draw no inference other than that a secret agreement did exist. In our Report, we stated:

> In our view, Pacific Westbound violated section 16 of the Shipping Act, 1916, by not taking independent action when it clearly had the right so to do. *This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act. Report*, p. 13. [Emphasis supplied.]

It is this distinction which Carnation has failed to grasp. There is a difference between a course of conduct which warrants the inference that the right has in fact been surrendered and a course of conduct which results in a violation of section 16, but is not so overwhelming as to enable the Commission to conclude that the right has been surrendered.

(b) *Far East Petition:* Far East Conference has asked for a clarification of our Report in order to delineate just what joint action PWC and FEC may take under Agreement No. 8200, pending the filing and approval of the so-called "supplementary agreements." Far East asks that we make clear that the two conferences are allowed to take "joint action

with respect to the rates * * * of either or both of them at joint meetings or by means of postal, telegraphic, or telex communication * * *." *Petition*, p. 5.

In our opinion, Agreement No. 8200 does not sanction such joint action. We thought it clear from our Report that we found Agreement No. 8200 to be

> nothing more than evidence of a general intention of the parties to enter into concerted ratemaking. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested persons as to how the agreement is to work. *Report*, p. 6.

We have again carefully restudied Agreement No. 8200, and our conclusion is re-affirmed. Agreement No. 8200 provided for an "initial meeting," at which time procedures were to be adopted for "the change of any rates, rules or regulations * * *." The Agreement itself does not set out these procedures, and thus it is not authority for joint rate action.

In our discussion of the concurrence procedures, we emphasized that the only provision in Agreement No. 8200 for concurrence (joint action) was for the placement of items on the agenda of the initial meeting. All other instances of the operation of the concurrence machinery, i.e., the assignment of items to the initiative list, rate changes on competitive items, and rate changes on initiative items, were "added" instances and thus constituted an unapproved supplementary agreement. Under our reasoning, affirmed here, there exists no *approved* agreement which permits joint rate action between PWC and FEC.

Nor is this position inconsistent with our finding that Agreement No. 8200 preserved the right of inde-

pendent action to each conference. A close reading of the independent action clause reveals that it allows each conference to notify the other of rate changes before such changes are to be effective. The clause by itself is not meaningless; such an arrangement between competitors would necessarily be an agreement subject to section 15 of the Shipping Act. However, the fact that it was included in Agreement No. 8200 does not mean that the Agreement sanctions joint rate action.

The petitions are denied.

By the Commission.[1]

(Signed) Thomas Lisi,
[SEAL] (Typed) THOMAS LISI,
Secretary.

[1] Commissioner Hearn did not participate.

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remedial action by each member [illegible]
of the undersigned [illegible]
both [illegible]
before [illegible]
[illegible]

[illegible]

By the Commission.

[SEAL] [illegible]

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